

Exhibit 3 to Plaintiff's
Memorandum of Points and Authorities
in Support of Its Motion for Temporary
Restraining Order and Preliminary Injunction
(PX01325)
Cited Portions of the Exhibit are Excerpted

[PORTIONS REDACTED]

FEDERAL TRADE COMMISSION

I N D E X

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WITNESS:	EXAMINATION:	PAGE
PERRY D. ODAK	BY MS. SLATER	4
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EXHIBITS REFERENCED

EXHIBIT	PAGE
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1 FEDERAL TRADE COMMISSION

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3 In the Matter of:)

4 WHOLE FOODS MARKET, INC.,)

5 a corporation,) File No. 071-0114

6 and)

7 WILD OATS MARKETS, INC.,)

8 a corporation.)

9 -----)

10 Tuesday, April 24, 2007

11

12 Room 5100

13 Federal Trade Commission

14 601 New Jersey Avenue, N.W.

15 Washington, D.C. 20001

16

17 The above-entitled matter came on for
18 investigational hearing, pursuant to notice, at
19 10:20 a.m.

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For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 ABIGAIL A. SLATER, ESQ.

5 MICHAEL A. FRANCHAK, ESQ.

6 Federal Trade Commission

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11

12 ON BEHALF OF THE WITNESS:

13 CHARLES M. ROSENBERG, ESQ.

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20

21

22 ALSO PRESENT:

23 ARTHUR J. DelBUONO, Ph.D., Financial Analyst

24

25

For The Record, Inc.
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1 P R O C E E D I N G S

2 - - - - -

3 Whereupon --

4 PERRY D. ODAK

5 a witness, called for examination, having been first
6 duly sworn, was examined and testified as follows:

7 EXAMINATION

8 BY MS. SLATER:

9 Q. Good morning.

10 Would you please state your full name for the
11 record.

12 A. Perry D. Odak.

13 Q. And who is your current employer, Mr. Odak?

14 A. I'm currently unemployed or not employed. I
15 don't know how I wish to describe that.

16 Q. Are you working on any projects specifically
17 aside from being in full-time employment?

18 A. Am I working on any projects.

19 Recently I agreed to join an LBO firm as an
20 operating partner, and that will commence on May 1.

21 Q. What is the name of that LBO?

22 A. That's called Genstar, G-E-N-S-T-A-R.

23 Q. Where is that LBO based out of?

24 A. San Francisco.

25 Q. My name is Gail Slater. I am an attorney with

1 the Federal Trade Commission. Today I will be asking
2 you a number of questions about supermarket retailing in
3 general and the proposed merger between Whole Foods and
4 Wild Oats in particular.

5 Mr. Odak, do you understand that you are
6 appearing here today pursuant to a subpoena from the
7 Federal Trade Commission?

8 A. I do.

9 Q. Have you ever been deposed or otherwise given
10 testimony before?

11 A. Yes.

12 Q. Can you describe to me the circumstances of
13 those depositions or testimony?

14 A. It's, you know, through litigation, both
15 personal and business litigation.

16 Q. Starting with the first occasion, could you give
17 me the particulars, please.

18 A. I've been in business 30 years. That's a long
19 time for me to remember.

20 I sued the IRS one time and was certainly
21 deposed by one of the AGs -- or no. Excuse me. It
22 wasn't the AGs -- one of the government attorneys that
23 was defending the case.

24 I've been deposed and appeared in court, in
25 federal court, on an unlawful termination. The company

1 was accused of discriminating against a group of
2 employees or a specific employee.

3 Q. Approximately when did this litigation occur?

4 A. That was probably in '73 or '74 time frame.

5 I've been involved in personal litigation. I
6 litigated against a former turnaround assignment to
7 collect the money that was owed me.

8 Q. Approximately when did this take place?

9 A. That was in 1995 through '98.

10 And then I've been deposed in '06 -- this is now
11 all personal I've covered so far, so far all I'm
12 covering is -- I guess it isn't all personal. I
13 shouldn't have qualified it.

14 In '06 I was, you know, in several depositions
15 involved with a matrimonial dispute with my ex-wife as
16 part of the divorce proceeding.

17 I'm trying to remember other business
18 situations. There has been. I just don't recall them
19 at this moment.

20 Q. Anything specific to Wild Oats?

21 A. No. I've never been deposed in any capacity
22 working for Wild Oats.

23 Q. Before we continue, I'd like to explain some of
24 the ground rules for our hearing here today.

25 As you know, you were sworn in a few minutes ago

1 by the court reporter so that all of my questions and
2 all of your responses will be recorded by her.

3 For her benefit and so the record is clear, can
4 we agree that we will stick to verbal communication;
5 meaning, instead of a head nod or an "uh-huh," you will
6 say "yes" or "no"?

7 A. We can agree to that.

8 Q. Thank you.

9 Also so the record is clear, can we please
10 agree, to the extent possible, not to speak over one
11 another; meaning, you will let me finish my questions,
12 and I will wait until the end of your responses before
13 asking the next question?

14 A. Certainly.

15 Q. Thank you.

16 If you don't understand a question, please don't
17 hesitate to let me know, and I will do my best to
18 clarify the question for you.

19 If you don't ask me to clarify a question, I
20 will assume you've understood it.

21 Is that okay with you?

22 A. Yes.

23 Q. During the course of this hearing, your attorney
24 Mr. Rosenberg may object to my questions. The grounds
25 for objecting under the Federal Trade Commission rules

1 are if the question calls for a response including legal
2 advice given to you by counsel or if the question
3 exceeds the scope of our investigation.

4 A. I understand.

5 Q. And aside from that, if your attorney objects
6 to one of my questions, you will ordinarily respond to
7 it.

8 Do you understand?

9 A. Yes, I do.

10 Q. Thank you.

11 We will take breaks throughout the day. Again,
12 please don't hesitate to ask for a break, and I will do
13 my best to accommodate you. Okay?

14 Mr. Odak, how did you prepare for the hearing
15 here today?

16 A. I was -- did preparation with the Wild Oats
17 attorneys.

18 Q. Who are they?

19 A. A Mr. Thomas Pak, I believe his name is, and a
20 Randall Doud.

21 Q. What did you discuss with them?

22 A. Is that not attorney-client?

23 MR. ROSENBERG: Yeah.

24 I'm going to object. There's a joint
25 cooperation agreement, and that would be protected by

1 attorney-client privilege.

2 MS. SLATER: And just so I understand it,
3 there's a joint cooperation agreement between Mr. Odak
4 and Wild Oats?

5 MR. ROSENBERG: Yes.

6 BY MS. SLATER:

7 Q. When did you enter into that agreement,
8 Mr. Odak?

9 A. I believe it was last week, Thursday or Friday.

10 MS. SLATER: And Mr. Rosenberg, is there
11 anything you'd care to tell us about the circumstances
12 or conditions of that agreement?

13 MR. ROSENBERG: No. Just in conversations I
14 had with counsel for Wild Oats we deemed it
15 appropriate.

16 BY MS. SLATER:

17 Q. Did you speak with anyone else about the hearing
18 here today, Mr. Odak?

19 A. No.

20 Q. Did you review any documents in preparation for
21 the hearing?

22 A. No.

23 Q. Did you review any data in preparation for the
24 hearing?

25 A. No.

1 Q. Did prices vary between the various price zones
2 at Wild Oats?

3 A. Yes.

4 Q. Do you recall the percentage variation between
5 the price zones?

6 A. Well, specifically, no. There were variations
7 depending on the competitive environment.

8 Q. And when you say "depending on the competitive
9 environment," what does that mean?

10 A. If you were in a market that had a very strong
11 mom-and-pop or you were in a market that Whole Foods was
12 in, you were much more, you know, careful in terms of
13 your pricing. And if you were in markets that there
14 were effectively not that competition, your pricing was
15 certainly higher.

16 Q. A couple of follow-ups on that.

17 You mentioned mom-and-pop.

18 Can you give me examples of what you would
19 define as a mom-and-pop?

20 A. A mom-and-pop would be a one-off store or two
21 or three that, you know, a -- that was privately held
22 that might have been a good competitor in the
23 marketplace. That's what I'd call a mom-and-pop, a
24 one, two, three-off store chain that was owned by a
25 proprietor.

1 Q. Do any specific examples come to mind?

2 A. You know, you're asking stuff that's today
3 seven, eight years old.

4 Q. Well, if you want to give me an example of what
5 you would consider a mom-and-pop today, that would be
6 helpful.

7 A. Well, I mean, every market has -- I don't care
8 where you go. There's a one-off store that somebody is
9 operating as a grocery store. Some of them are terrible
10 and some of them are good.

11 Korean grocers in New York City, you know, most
12 of them are one-off stores operated by a family who
13 works twenty-hour days.

14 I mean, for me specifically to say, you know,
15 list a bunch of mom-and-pops, you know, I --

16 Q. Okay.

17 A. Okay.

18 Q. Would Sunflower be a good example of a
19 mom-and-pop?

20 A. Today they're bigger than a mom-and-pop and --
21 today they're bigger than a mom-and-pop because, you
22 know -- but when they started, you know, that would be
23 considered a mom-and-pop store.

24 Q. What about New Seasons? Are you familiar with
25 that store?

1 A. Yeah. New Seasons when they started, you know,
2 you would classify it as a competitor in a market that
3 you would be cognizant of their pricing when you
4 priced.

5 Q. Were conventional supermarkets part of this
6 competitive environment that you described?

7 A. Well, yes and no.

8 I mean, no in terms of specific pricing.

9 I mean, a conventional supermarket is about a
10 30 percent perishable business. This format, the
11 Wild Oats organic and all-natural format, was over
12 [REDACTED] percent perishable, so you were not running head to
13 head with, you know, with them.

14 The yes part is you were depending on people who
15 were shopping at conventional who woke up any morning or
16 had a life-changing event that said, you know, I've got
17 to eat healthier, and you were depending on bringing
18 those customers in, but you were not -- you know, you
19 were essentially not pricing against a conventional
20 supermarket. That was absolutely secondary to any
21 pricing decision.

22 Q. And you mentioned Whole Foods as part [REDACTED]
23 [REDACTED]

24 Can you explain to me what you mean by that?

25 A. Well, we knew that from a competitive standpoint

1 that [REDACTED] Whole Foods and expect
2 that we're going to build the business, so we as a
3 pricing policy strove, where Whole Foods was a
4 competitor, [REDACTED]
5 [REDACTED]

6 Q. Can you explain to me what a market basket is?

7 A. It's probably 50 to 150 items, somewhere
8 between 50 and 150 SKUs, stockkeeping units, that the
9 consumer knows in his or her head what the price should
10 be.

11 What I'm talking about is I'm sure everybody in
12 this room who shops probably knows what bananas and
13 tomatoes and milk and butter and cereal cost, and what
14 you have in mind is different than someone else would
15 have in their mind, so it's 50 to 150 items.

16 Those items you wanted to make -- those items
17 you did price comparisons to competitors in the market
18 to make sure that your pricing strategy, whatever it
19 was, you know, took into account where they were in
20 their pricing.

21 Q. [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 A. Probably [REDACTED] out of [REDACTED] times it was
25 Whole Foods when we did price checks.

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A. The market was not performing. You know, in other words, the comp sales were on, you know, either a negative or a no-growth trend, and we could not figure out why, and it was part of let's understand the market better.

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So it was -- I think we did some quantitative research, we did some qualitative research, and we did professional price checks in that market to gather the data to understand what was going on, try to understand what was going on in the marketplace.

21

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23

Q. I just want to take a step back there. You said you did quantitative, qualitative and professional price checks.

24

25

Can you explain to me what each of those means, please?

1 it.

2 And I don't believe there was anybody else in
3 that which I think -- I think it was those three
4 companies that we price-checked against.

5 Q. And correct me if I'm wrong, but I think you've
6 explained that this was a somewhat unusual price check
7 at Wild Oats.

8 A. That's correct.

9 Q. [REDACTED]
10 [REDACTED]

11 A. [REDACTED]
12 [REDACTED]

13 Q. Okay. And were Laura Coblentz and Chad Smith
14 also heading up the Whole Foods-specific price checks?

15 A. Well, Chad Smith -- and remember, the price
16 checks were done on [REDACTED] and -- but
17 Chad Smith was the one that would find an outside
18 professional firm that did this for a living and he was
19 the one that would initiate that.

20 Q. And with the Whole Foods price checks, would
21 that involve the three-step process we've already talked
22 about, meaning, quantitative, qualitative and
23 professional price checks --

24 A. No.

25 Q. -- or was it less extensive than that?

1 A. No.

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9 Q. Going back to the '06 price check, what was the
10 purpose of that price check, and did a pricing policy
11 result from that exercise; and if it did, what was it?

12 A. The purpose of the price check is to see,
13 you know, determine did we think pricing was the issue
14 and also to try to quantitize -- get quantitative data
15 to see what [REDACTED] doing.

16 [REDACTED] was spending a lot of money in the
17 market launching [REDACTED], and I specifically wanted
18 to see, you know, where they were in pricing because
19 they had launched -- I don't know -- two or three
20 hundred SKUs, in that magnitude.

21 If my memory is correct, what we -- one of the
22 things that came out of it was that we were [REDACTED]

23

24

25

1 Q. What do you mean by [REDACTED]

2 [REDACTED]?

3 A. We were probably [REDACTED] the
4 competition in the marketplace.

5 Q. [REDACTED]

6 [REDACTED]

7 A. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

I never

14 believed it was the same shopper that was shopping

15 [REDACTED], you know, so it was -- it was more in relation

16 to Whole Foods than it was in just in relation to the

17 other two companies.

18 Now, certainly when you lower prices, you lower
19 them in a market, and that customer that does shop more
20 than one store, you're hoping that they will notice that
21 your pricing is a little more competitive.

22 Q. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 A. [REDACTED]

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Q.

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A.

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Q. Where you were. I'm sorry. Thank you. That's helpful.

6

7

And I didn't ask you, on this '06 basket, how many items were in that basket?

8

A. I would say a [REDACTED], plus or minus, items.

9

Q. And were they similar in nature to the items in the regular price check against Whole Foods; meaning, were they price-sensitive items?

11

A. Yes.

12

Q. And at the time that you left Wild Oats in 2006, how many items were carried by an average Wild Oats store?

14

A. There -- are you asking the number of SKUs carried by them?

16

Q. Yeah. I'm sorry.

17

If you want to clarify that, would you count in terms of SKUs or items?

19

A. SKUs.

20

Q. SKUs. Okay.

21

How many SKUs were carried in a Wild Oats store at that time?

23

A. Oh, probably 44,000.

1 MR. ROSENBERG: Do you want to read the question
2 back, please.

3 (The record was read as follows:)

4 "QUESTION: And was the strategy to eventually
5 phase out the equivalent brand and replace it entirely
6 with a Wild Oats private label product?"

7 THE WITNESS: Oh, okay.

8 The second part of the question was, was in '06,
9 you know, there became a very aggressive -- to get out
10 of the store those items that were showing up at Safeway
11 and Kroger, et cetera, get them out of the store,
12 replace them with either private label or other new
13 products, so it was part of the strategy not only to
14 grow it but also to get out of the store those items
15 that consumers could see in Safeway and then
16 price-compare at Safeway or Kroger or Albertsons.

17 BY MS. SLATER:

18 Q. When you say "those items," could you give me
19 examples of the kinds of items or brands that we're
20 talking about here.

21 A. Newman's Own, you know, product, everything from
22 cookies to salad dressing, I mean, it's sold everywhere,
23 so it's not unique, and you're not going to make the
24 margin you want on it, and the consumer can easily
25 compare prices, you know, so Newman's Own would be a

1 prime example.

2 Q. So is it fair to say they were national brands
3 that were natural and organic in nature?

4 A. Yes. They could have been, you know, yes. Over
5 all, they were natural or organic in nature.

6 Q. But not a national brand such as Coca-Cola
7 because you did not stock those items.

8 A. Correct. We did not -- for a time we stocked
9 some national brands in the store, but we took them out
10 of the store.

11 Q. And just going back to the baskets, and we
12 discussed checking against conventionals and natural
13 and organic retailers, can you, to the best of your
14 ability, give me a definition of what you would refer
15 to as a conventional supermarket and what
16 differentiates the conventional from natural and
17 organic retailers?

18 A. I mean, the easiest way for me to define a
19 conventional retailer is, say, you know, Safeway,
20 Kroger, and Albertsons are a conventional grocer.

21 I mean, there's really only two players -- if
22 you look at the antithesis of that, there's really only
23 two players of any substance in the organic and all
24 natural, and that's Whole Foods and Wild Oats. There's
25 a few mom-and-pops and there's some co-ops, but by far

1 the two big players are, you know, and there's really
2 nobody else in that particular space.

3 And then you asked me -- part B of the question
4 was?

5 MS. SLATER: Josett, can you help us, please.

6 (The record was read as follows:)

7 "QUESTION: And just going back to the baskets,
8 and we discussed checking against conventionals and
9 natural and organic retailers, can you, to the best of
10 your ability, give me a definition of what you would
11 refer to as a conventional supermarket and what
12 differentiates the conventional from natural and
13 organic retailers?"

14 THE WITNESS: Okay. Part B is what
15 differentiates. That's the question I'm answering. I
16 presume that's what you're asking me.

17 BY MS. SLATER:

18 Q. (Counsel nodding.)

19 A. Is that a yes?

20 Q. Yes. Thank you.

21 A. When you look at the two businesses -- and I
22 think I previously said this -- the organic -- you know,
23 the Wild Oats stores on the organic and all natural
24 side, you know, were [REDACTED] percent perishable. A
25 conventional supermarket operates about a 30 percent

1 perishable business.

2 And this is a -- predominantly a perishable
3 buyer that, you know, when you think about eating
4 healthy, you're thinking about fresh food, not
5 processed food, so the center of the store is less
6 important in this format where it's paramount to being
7 important in a conventional supermarket because that's
8 where they make their money. [REDACTED]

9 [REDACTED]
10 [REDACTED]

11 Q. Why do conventional supermarkets make their
12 money at the center of the store?

13 A. Because they get so much money for slotting fees
14 and promotional trade allowances from the big CPG
15 companies, that's where they make, you know, the bulk of
16 their money in the store.

17 I mean, I think it's been, you know, quoted, you
18 know, numerous times, you know, that, you know, if
19 you -- by, you know, some of the analysts, if you took
20 out the amount of money they make in slotting fees, they
21 would not be profitable. You know, their profit comes
22 from, you know, selling those tombstones over and over
23 again, you know, in the store.

24 Q. Does that mean that natural and organic
25 suppliers to stores such as Wild Oats don't have

1 slotting fees and allowances and such?

2 A. Well, specifically Wild Oats, we never had
3 slotting fees. We do trade promotions but no slotting
4 fees.

5 Q. What's a trade promotion, please?

6 A. A trade promotion is what I would call a
7 temporary price reduction where an item or, let's say,
8 an SKU has a temporary price reduction of so many cents
9 a unit over a four to six to eight-week time period that
10 you can buy it from that supplier at a lower price. The
11 expectation is you're going to pass that lower price on
12 to the consumer as a way to induce that consumer to buy
13 more product.

14 Q. And who is the decision maker insofar as trade
15 promotions are concerned or trade promotions to
16 Wild Oats were concerned?

17 A. There's two drivers to that. One is primarily
18 the business -- the end of the business that you're
19 talking about comes through UNFI, so UNFI would get
20 notice from its vendors that an item or items would be
21 on a temporarily price reduction. UNFI then would
22 inform the company that these items were, and the
23 company then would make a decision of whether to
24 advertise or make known that and the company would make
25 a decision of how much of that temporary price reduction

1 was passed on to the consumer.

2 The other part of it is what we instituted
3 was -- I'm trying to choose my words carefully here -- a
4 program of the buyers would directly deal with these
5 vendors themselves and develop additional trade
6 promotions over and above what UNFI was seeing. Most of
7 the time they would be scan-downs and that scan-down
8 would certainly be advertised and penny for penny would
9 be passed on to the consumer.

10 So it was two pieces. It was what came through
11 UNFI or through distribution and what was done directly
12 by the buyers.

13 Q. [REDACTED]

14 [REDACTED]

15 A. [REDACTED]

16 [REDACTED]

17 Q. When you were discussing or explaining the UNFI
18 trade promotions and you mentioned that the expectation
19 was that the retailer would pass on the temporary price
20 reduction, was that always the case that the price
21 reduction was passed on?

22 A. Yes and no.

23 I mean, we -- well, two things happened. You
24 know, when you have a temporary price reduction,
25 typically UNFI would forward-buy, in other words, would

1 buy much more than they needed for the time -- for that
2 time period so that they got the benefit of that price
3 promotion over a longer period of time by basically
4 stocking inventory in their warehouse.

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17 The expectation in terms -- so the expectation
18 was not met in terms of a vendor because of the money
19 that UNFI was pocketing by forward buying.

20 The next one is, if I have a temporary reduction
21 of 20 cents a unit, let's say, on this cup of coffee,
22 the vendor would hope that you would pass that on to the
23 consumer so that what they reduced didn't go in your
24 pocket.

25 When there was -- when you had felt that there

1 was no competition in the marketplace, you would pocket
2 some of that, but when there was competition in the
3 marketplace, you were afraid if you didn't pass it on,
4 you know, that people would notice that this cup of
5 coffee, this was on a better promotion at your
6 competitor than it was in your own store.

7 So it depended on the competitive environment
8 how much you passed on.

9 Q. And when you say competition in the marketplace
10 versus no competition in the marketplace, could you
11 explain to me exactly what you mean by that.

12 A. Well, I mean, if Whole Foods was in the
13 marketplace and passing that on and you wanted to stay
14 competitive, you probably didn't take the risk of
15 not -- of pocketing some of that temporary price
16 reduction.

17 If you weren't facing competition in the market,
18 you may have not passed all of that on to the consumer;
19 you may have kept a piece of that to improve your own
20 profit margins.

21 Q. And in terms of temporary price reductions,
22 would we only be talking about Whole Foods in terms of
23 competition in the marketplace and pass-on, or do any
24 other retailers come to mind?

25 A. Let me just think about that for a second.

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was Whole Foods that you were worried about and what they were going to do with that price promotion.

Q. And would these temporary price reductions be a reason why Wild Oats' margins might differ from one price zone to the next, because in one price zone you were meeting less competition from Whole Foods versus another price zone?

A. Well, but you asked me two different questions.

Q. I did? Okay. Let me clarify for you.

A. Okay.

Q. Did the fact that in some price zones Wild Oats met less competition from Whole Foods than in other price zones mean that these price reductions helped your margins in that price zone because you didn't have to pass them on?

A. A black box redacting the answer to the question, covering approximately two lines of text.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] If you were worried about the competition,
5 [REDACTED] you, you
6 know, passed those price promotions on most of the time
7 penny for penny. If you were less worried about or it
8 was not an issue either because Whole Foods was above
9 you or not in the marketplace, you had the opportunity
10 to pocket some of that money, and at times we did.

11 Q. And when we're talking about temporary price
12 reductions, are we mainly talking about UNFI here, or
13 were other suppliers also involved in this kind of
14 activity, promotional activity?

15 A. Well, as I said, you know, it's mainly
16 shelf-stable or grocery items, which is, what, the
17 [REDACTED] percent of the business, which is the smaller part of
18 the business, and UNFI was the major supplier of that.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Q. And when you say they were handled on a
24 scan-down basis, does that mean that they were passed
25 on --

1 A. Yes.

2 Q. -- or not?

3 A. Yes.

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9 Q. What do you think will happen to the UNFI price
10 reductions, should Whole Foods buy Wild Oats, at the
11 combined company?

12 MR. ROSENBERG: Objection. Speculation.

13 MS. SLATER: You can answer the question.

14 MR. ROSENBERG: Yes.

15 MS. SLATER: Thank you.

16 THE WITNESS: Well, I mean, if I were, you know,
17 in a position to be running the business and I had no
18 longer had the competition, I might be inclined to do
19 two things: reduce my dependence on UNFI because I now
20 can have more self-distribution; and secondly, I'm not
21 going to worry about competition and I'm going to be
22 inclined to pocket a piece of that temporary price
23 reduction to improve my margins.

24 BY MS. SLATER:

25 Q. And when you say "self-distribution," is that

1 market is growing faster, your big buyers are going to
2 get preference, and if you're a casual buyer and not a
3 big buyer, you're going to get shorted.

4 I mean, it happens the other way around, I
5 mean, you know, whether -- Wild Oats buys
6 conventionally grown produce, and it doesn't have
7 nearly the leverage to buy that a Safeway does,
8 et cetera, but you know, on the organic side it has more
9 leverage than Safeway has, so I mean, that's the law of
10 averages.

11 I mean, I was with Jeff Noddle, who is the
12 president of Supervalu, and they opened a store up in
13 Cincinnati called --

14 Q. Sunflower?

15 A. -- Sunflower. And you know, they've had a
16 difficult time with that store, and his comment to me
17 is: We totally underestimated what it takes to buy
18 organic produce. We figured given the volume of
19 conventional-grown produce we buy it would be no
20 problem. We totally underestimated what it would take
21 for us to buy, you know, what we needed going in those
22 stores.

23 So you know, I -- so I look at it from the
24 standpoint of the law of numbers in terms of who's going
25 to get preference and then I look at some what I call

1 anecdotal information from, you know, the CEO of a
2 rather large player in the marketplace.

3 Q. When you were discussing these supply issues
4 with the CEO of Sunflower, did you also discuss any
5 issues that his company experiences with shrink rates of
6 organic product?

7 A. With him, no.

8 Q. Have you discussed it with other conventional
9 retailers?

10 A. Yes.

11 Q. Can you describe to me the issues that they
12 experienced with shrink rates and getting the supply
13 chain right?

14 A. Well, the issue is that until you have a
15 predictable demand or takeaway at the store, you don't
16 know how much to buy. If you buy too much and you don't
17 sell it because you're trying to get in the market, you
18 shrink it out and you lose money. If you buy too
19 little, the consumer comes in your store and says you're
20 not in the business, you know, of organic and I'll go
21 buy it someplace else.

22 So you know, the conventionals have a very
23 difficult time getting into this business. One, as I
24 said, it's primarily a or predominantly a perishable
25 business. And two, they have never been able to

1 establish a predictable takeaway from the product.

2 So you can walk any Safeway today, and I've
3 walked hundreds of Safeways and counted the number of
4 organic items even in their new stores, in produce, and
5 it's 48 to 50 SKUs. You know, Whole Foods/Wild Oats
6 probably has [REDACTED] SKUs in the department.

7 And you know, I have specifically sat and
8 talked to the department managers there, and what
9 happens is they tell me they get a big push, you got to
10 get more organic, carry more organic. Then when they
11 miss their numbers because, you know, they bought too
12 much and they shrunk out, they get heat from corporate
13 headquarters to the store director, who then puts heat
14 on the department manager, and the first thing he or
15 she does is cut back on the amount of organic they have
16 in the store. Because why? They get pressure to make
17 their numbers.

18 And we've seen this for the five or six years I
19 ran the company. This has been a consistent pattern.
20 They have a big push on. It doesn't sell through.
21 Their margins aren't where they ought to be, and it
22 shrinks back and shrinks back and shrinks back. There's
23 less and less organic in those stores.

24 So they've had a difficult time pushing into
25 this perishable side of the business.

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1 Q. Do these issues apply only to Safeway, or have
2 you talked to a number of different conventional
3 retailers about this?

4 A. I think it applies to all the conventional
5 retailers, you know, because, you know, of the shrink
6 issue and the pressure that they put on in terms of
7 margins.

8 Q. Just to be clear, you've gained this
9 understanding from conventional retailers such as store
10 managers and Safeway stores and -- Safeway stores that
11 you've visited?

12 A. I mean, I've gained this knowledge from just
13 firsthand over the last five or six years of watching
14 them, you know -- you know, watching them bring it in,
15 watching them build new stores, watching them have a
16 push on, then pull it back.

17 You know, the produce -- the guy that buys all
18 the produce for Wild Oats used to be one of the head
19 buyers at Safeway. He can tell you firsthand the
20 problems that goes on inside that company.

21 So I've heard it from people who used to work
22 with Safeway that now work for Wild Oats, I've heard it
23 from store directors and department managers, and I've
24 just seen it firsthand, you know, what's going on, so
25 it's six years of all of the above.

1 Q. What's the name of the Wild Oats buyer you just
2 referred to?

3 A. Don is his first name. It will come to me, but
4 Don is his first name. He's the vice president of
5 produce at Wild Oats. Okay?

6 MS. SLATER: Maybe the name will come back to
7 you during the break, which I propose we take now.

8 THE WITNESS: Okay.

9 MS. SLATER: Thank you.

10 (Whereupon, at 12:09 p.m., a lunch recess was
11 taken.)

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1 say, a 20,000-square-foot store as your benchmark.

2 Could you give me an idea of the amounts of
3 money that are involved in equipping the store after
4 you've signed the lease.

5 A. Well, but Wild Oats didn't build any
6 20,000-square-foot stores.

7 Q. Oh, I'm sorry.

8 What was, for example, the smallest store that
9 was built during your time?

10 A. Well, the model at that time was 27 to, what,
11 33, so you know, around 30,000 square feet for a
12 Wild Oats store.

13 Q. Well, maybe taking a 27,000-square-foot store,
14 could you talk me through the costs involved --

15 A. Well, typically --

16 Q. -- in dollar terms.

17 A. -- you had your cost to put all your -- all the
18 tenant improvements in less what the builder credited
19 you back on.

20 You had inventory that you had to put in the
21 store and then you had a preopening cost, which is
22 everything from, you know, the labor to fill all the
23 shelves, to train the people, you know, the initial
24 advertising and introduction, PR work, et cetera.

25 I mean, those are the cost factors that, you

1 know, went into -- that were out of pocket to the
2 company to open a store, build a store.

3 Q. And do you recall the dollar amounts involved
4 either for each of these cost components together or
5 broken out, whichever is easier for you?

6 A. Yes.

7 Q. Could you talk me through them, please.

8 A. You know, the store in terms of over and above
9 your TI credit you spent anywhere from [REDACTED]
10 million dollars. You know, you were shooting somewhere
11 between [REDACTED] [REDACTED] would have been on the
12 upper end.

13 You can probably put, you know, [REDACTED]
14 hundred thousand dollars worth of inventory in the
15 store.

16 And you spent plus or minus [REDACTED] as
17 preopening cost.

18 Q. Going back to leases and such, I had a question
19 which I neglected to ask, which was: Did Wild Oats ever
20 find itself in a bidding situation for a lease at a
21 particular location during your time there?

22 A. Yes.

23 Q. And was that a frequent occurrence?

24 A. It became more frequent as we were opening and
25 building better stores and better-performing stores. We

1 found ourselves pitted against, you know, competitors in
2 the marketplace.

3 Q. Any competitors in particular?

4 A. Whole Foods.

5 Q. Anyone else?

6 A. I lost a location in South Beach to Publix.

7 That was an unusual situation. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 No. I mean, I only remember Whole Foods, you
11 know, that we got pitted against, but again, that was
12 later as the company got much stronger.

13 Q. When did these bidding situations begin to
14 occur?

15 A. Probably in '05.

16 Q. And what was happening at Wild Oats in terms of
17 the real estate strategy that brought you into bidding
18 situations more often with Whole Foods?

19 A. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 But the reality is, the bigger thing is that we
24 just got more confident in terms of our store competing
25 and being able to convince the developers that we were a

1 better option.

2 Q. Did Wild Oats have a strategy to enter into
3 locations where Whole Foods had an existing store?

4 A. Yes.

5 Q. And when did this strategy come into play?

6 A. It came into play -- I think we presented that
7 to the board of directors in the August board meeting of
8 2005, was put back on the table in February of 2006. We
9 had, you know, shown the board areas that we thought we
10 ought to just go right in and go right head to head with
11 Whole Foods.

12 Q. Were there any particular characteristics of the
13 Whole Foods stores that drew Wild Oats' attention?

14 A. [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 I mean, we had been subject to Whole Foods being
18 very predatory and we needed to push back for them to
19 understand that they weren't going to just come into our
20 market unscathed anymore, that we could do the same
21 thing back to them.

22 Q. Would you give me examples of the locations
23 where this 2005 strategy was implemented by Wild Oats.

24 A. Well, I mean, that's a big question.

25 I mean, Whole Foods had a site in -- on Matilda

1 in Sunnyvale that we took away from them. We were
2 faster, nimbler, and we could build a smaller store,
3 which the developers liked, and we took that site away
4 from Whole Foods.

5 29th Street in Boulder itself was committed to
6 Whole Foods. We took that site away from them from the
7 builder.

8 In terms of starting to go head to head,
9 Houston -- we decided to go down into Texas and we went
10 into Houston right into Whole Foods' territory, and I
11 know we took down one location in some suburb of Houston
12 and then -- I don't remember if by the time I left we
13 had taken it or not, but there was a second site in
14 Houston that we were taking.

15 And then we were very active at looking at store
16 locations in Dallas, Texas. We looked at all the
17 Albertsons stores that came on the market to locate.

18 So we had made a conscious decision to go right
19 head to head with Whole Foods.

20 Q. And what was the outcome of this head-to-head
21 competition with Whole Foods?

22 A. Well, you know, it still hadn't totally happened
23 yet.

24 I mean, what we were seeing that gave us the
25 confidence [REDACTED]

1 [REDACTED] stores that were
2 literally located across the street from each other,
3 that when we ran the store well and it was merchandised
4 well would perform very well against Whole Foods.

5 So it was just a myriad of things that told us,
6 you know, that we were ready to go head to head with
7 them.

8 Q. How did Whole Foods react to this head-to-head
9 competition?

10 A. The only thing I can, you know, point to is,
11 you know, Mr. Mackey bringing his staff into some of
12 our newer stores and walking the stores, which I knew
13 we were getting their attention when he was bringing
14 his senior staff in and walking some of our newer
15 stores.

16 And there were cases -- and I've got to pull it
17 from my memory -- but where we knew they were just
18 incensed that we took locations from them, incensed.

19 I mean, Boulder was one, and then they turned
20 around and announced to the public and announced to the
21 stock market or to their -- yeah, on their conference
22 call that they were going to build an 84,000-square-foot
23 store in Boulder. Okay?

24 So I mean, we knew we were getting their
25 attention.

1 Q. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 A. [REDACTED]

6 [REDACTED]

7 Q. I guess maybe I could ask the question in
8 reverse.

9 You mentioned earlier that Whole Foods had had a
10 strategy -- I think you said it was a predatory strategy
11 with respect to Wild Oats.

12 Did Wild Oats have a way of gauging the impact
13 that the Whole Foods store had on Wild Oats' nearby
14 location?

15 A. Certainly.

16 Q. Using an example if it helps, could you give me
17 an idea of the order of magnitude of the impact of a
18 Whole Foods store to a Wild Oats store located nearby.

19 A. Yes.

20 Q. Okay. And what would be a good example?

21 A. Well, it ranged from, you know, probably a low
22 of [REDACTED] percent to a high of [REDACTED] percent that they -- of
23 the business that was taken away from that particular
24 store.

25 Q. Do you recall which location that the [REDACTED] percent

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2

3 DOCKET/FILE NUMBER: 071-0114

4 CASE TITLE: Whole Foods Market/Wild Oats Markets

5 HEARING DATE: April 24, 2007

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: APRIL 24, 2007

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

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21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.

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